The Prudential Insurance Company of America *and* Richard J. Prueter. Case 7–CA–35742

May 9, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On January 17, 1995, Administrative Law Judge Lowell M. Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(1) of the Act when its sales manager, Matthew Voelker, advised employee Richard J. Prueter that, if he wanted to succeed or get into management, he should not join the Union. The judge, however, recommended dismissal of certain other 8(a)(1) allegations, including allegations that the Respondent's general manager, Frank Desy, interfered with employee Section 7 rights by indicating to Prueter that the Respondent would not cooperate with the Union concerning the processing of grievances, and that the grievance process was ineffectual, and also interfered with employee rights by cautioning employees not to obtain advice from the Union. The General Counsel excepts to the judge's recommended dismissal of these allegations. We find merit in the General Counsel's exceptions.

On October 25, 1993, Desy met with Prueter to discuss his announced intention to file a grievance against Sales Manager Voelker. At that meeting, Desy warned Prueter about ''getting bad advice'' concerning his filing of the grievance: ''[w]riting a grievance . . . will lead to a bad situation,'' Desy continued, ''[i]f the person you are talking with is not trustworthy and is a troublemaker . . . .'' Desy further warned Prueter ''to be careful who [he was] getting advice from,'' that he ''could write a grievance if [he] so chose to,'' but that ''it was up to [Desy] to handle any grievance or explanation . . . .'' After then explaining that Prudential required that a written report be submitted over the grievance, Desy told Prueter that it was not up to the Union to resolve it, that the ''Union had no part of the Prudential,'' and that ''[t]his was a Prudential matter . . . .'' Desy repeated his instructions to Prueter to file a written report, and that ''it didn't matter what happened during the grievance procedure, even if [Prueter] filed [the grievance,] it would be up to [Desy] to solve it . . . .''

Desy's warnings concerning the grievances suggested that it was futile for Prueter to seek the help of the exclusive representative.[2] Desy also implied that the Respondent would not cooperate in resolving the grievances that the Respondent knew were then forthcoming, and conveyed the impression that the contractual grievance procedure was futile. These statements had a reasonably foreseeable effect to discourage Prueter from invoking the grievance procedure and thereby violated Section 8(a)(1) of the Act.[3] Moreover, Desy's equating Prueter's bargaining representative with a ''troublemaker''[4] and Desy's threat that a ''bad situation'' would befall Preuter if he pursued grievances, also tended to interfere with employee Section 7 rights in violation of Section 8(a)(1).[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, the Prudential Insurance Company of America, Howell and Waterford, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 1(b), (c), and (d) and reletter the remaining paragraph.

''(b) Referring to union representatives as 'troublemakers.'

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Prueter was represented by Local 1161, United Food and Commercial Workers International Union, AFL–CIO.

[3] See *Laredo Packing Co.*, 254 NLRB 1, 2 (1981); *John Klann Moving & Trucking Co. v. NLRB*, 411 F.2d 261, 263 (6th Cir. 1969).

[4] See *Pottsville Bleaching Co.*, 303 NLRB 186, 189 (1991). According to Prueter's credited testimony, the ''troublemaker'' was the person who was giving advice to Prueter concerning his grievance. The Respondent does not contend that the advisor was someone other than a union representative.

Member Truesdale finds that the General Counsel has not established in the context of this case that the ''troublemaker'' referred to was Prueter's bargaining representative, and accordingly he would not find that the remark violated the Act here.

[5] As these violations occurred at the Respondent's Waterford, Michigan facility, we reject the Respondent's argument that the notice should be posted only at its Howell, Michigan facility. The judge's decision inadvertently referred to this location as ''7 and Owell, Michigan'' in Sec. 2(a) of the recommended Order. We shall correct the error.

''(c) Suggesting that the grievance procedure is ineffective or implying that it will refuse to cooperate with the contractual grievance procedure.

''(d) Threatening employees with unspecified reprisal for their participation in the grievance process.''

2. Substitute the following for paragraph 2(a).

''(a) Post at the premises of the Prudential Insurance Company of America, 9500 Highland Road, Howell, Michigan, and the River Vail Office Building, Waterford, Michigan, copies of the attached notice marked 'Appendix.'[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT advise employees that, if they want to succeed or get into management, they should not join the Union.

WE WILL NOT suggest that the grievance procedure is ineffectual or imply our refusal to cooperate with the contractual grievance procedure.

WE WILL NOT refer to representatives of your exclusive collective-bargaining representative as ''troublemakers.''

WE WILL NOT threaten employees with unspecified reprisals for their participating in the contractual grievance process.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Ellen Rosenthal, Esq., for the General Counsel.
Theodore R. Opperwall, Esq., of Detroit, Michigan, for the Respondent.
Richard J. Prueter, of White Lake, Michigan, in propria persona.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge. The charge filed by Richard J. Prueter on March 28, 1994, was served on the Respondent, the Prudential Insurance Company of America, on March 28, 1994. The amended charge filed by the Charging Party on April 18, 1994, was served on the Respondent on April 18, 1994. A complaint and notice of hearing was issued on May 12, 1994. Among other things it is alleged in the complaint that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act).

The Respondent filed a timely answer denying that it had engaged in unfair labor practices alleged.

The matter came on for hearing at Detroit, Michigan, on September 22, 1994.

Each party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all material times, the Respondent, a corporation, has maintained offices, agencies, and places of business in various States throughout the United States, including facilities located at 9500 Highland Road, Howell, Michigan (the Howell facility), and 5215 Highland Road, River Vail Office Building, Waterford, Michigan (the Waterford facility). The Respondent is, and has been at all material times, engaged in the sale and related servicing of various types of insurance. The Respondent's Howell and Waterford facilities are the only facilities involved in this proceeding.

During calendar year 1993, the Respondent, in conducting its business operations described above, received insurance premiums valued in excess of $500,000, of which at least $50,000 represented premiums received from policyholders located outside the State of Michigan.

At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

First: During the period in which the events here detailed occurred a labor agreement between the Respondent and Local 1161, United Food and Commercial Workers International Union, AFL–CIO was in existence that covered the Charging Party, Richard J. Prueter. Under the agreement employees were free to choose whether they wanted to be union members; Prueter filled an application for union membership on September 24, 1993. Prueter worked from August 9, 1993, to January 21, 1994. He was employed as a sales representative. Matthew Voelker, the sales manager, was Prueter's supervisor. Frank Desy, the general manager, hired Prueter. According to Prueter, Desy told him that he would have company paid training and that Voelker ''would be with [him] day and night, making phone calls, going on every single appointment with me for the first three months and during that time period no expectations would be made . . . .'' Prueter was given a 13-week subsidy after which his sales were to sustain him. This event did not occur. Prueter quit. He was dissatisfied with the training he was given and claimed that the Respondent had not lived up to its representations.

Second: The General Counsel charges in his complaint that Voelker on or about September 28, 1993, told an employee that if he wanted to go into management or succeed with the Respondent he should not join the Union.

To support this charge the General Counsel offered the testimony of Prueter. Prueter testified that on September 28, 1993, he was riding with Voelker in an automobile to an appointment with a Prudential client. After some ''general small talk'' Voelker stated that ''he did not want [Prueter] talking with other [Prudentail agents] . . . that if [he] ever wanted to succeed with Prudential . . . that [he] should not join the [U]nion . . . that the top fifteen members of our district, the sales representatives, were not members of the [U]nion and no manager ever was a member of the [U]nion, even when they were a sales representative.''

According to Prueter, Voelker also stated that he was giving Prueter this information because Desy had told him that he had seen Prueter speaking to Greg McKnight, union grievance officer, and other union member sales representatives at Desy's house party.

On October 26, 1993, Prueter filed a grievance ''On 9/28/93, S/M Voelker specifically instructed Agent Richard Prueter not to join the Union and not to speak to Agent Greg McKnight (D.O.C.). He went on to state that Agent McKnight is nothing but a loser and that only complainers and low sales producers are [u]nion members.'' In answer to the grievance the Respondent admitted that Voelker did say ''that members of [m]anagement were not members of the Union.''

Prueter had become dissatisfied with the Respondent's training and had filed eight grievances against the Respondent. Voelker denied that he had said to Prueter ''if you ever want to succeed or get ahead or get into management, don't join or you should not join the [U]nion.'' Voelker denied that he had ever mentioned union to Prueter. Voelker testified that he advised Prueter that he ''was talking to too many people and getting too many answers.''

The Respondent produced evidence that some successful agents were union members and some had become managers. From the fact that some union agents were successful the Respondent argues that I should find that Prueter is not telling the truth. Voelker, at the age of 27 (the same age as Prueter) had advanced to sales manager (now functional manager) apparently in a short time. Thus, the inference certainly obtains that Voelker may have attributed his rapid advancement in part to his nonunion membership and he was imparting this information to Prueter as something that might be of value to him.

I do not believe that Prueter fabricated the story; he set out similar testimony in a grievance filed less than a month after the incident. Demeanor considered, I find Prueter to be a credible witness.[1] I find by Voelker's remarks detailed above the Respondent violated Section 8(a)(1) of the Act.[2]

Third: The General Counsel alleges that the Respondent, by its agent Matthew Voelker, on October 19, 1993, created the impression that employees' union activities were under surveillance by the Respondent.

The General Counsel offered the following testimony of Prueter. ''He [Voelker] then said, do you think Frank and I are deaf, we hear things. At that point . . . I listed the problems I was having . . . .'' Voelker testified that he asked Prueter, ''I hear from several agents that you are having some sort of problems, what's going on?''

The General Counsel claims that the statements ''do you think Frank and I are deaf, we hear things'' ''created the impression that the Respondent engaged in surveillance of Prueter's attendance at a union meeting'' and thus violated Section 8(a)(1) of the Act. A valid inference cannot be drawn that the remark referred to the surveillance of employees' activities protected by Section 7 of the Act. This allegation is dismissed.

Fourth: The General Counsel in his complaint further alleges that Frank Desy on October 26, 1993, denigrated the Union and interfered with employees' rights by cautioning the employees not to obtain advice from the Union and that, also on October 26, 1993, Desy stated to employees that the Union had nothing to do with the Respondent and that the contractual grievance procedure was ineffectual.

The General Counsel supports these allegation by the following testimony:

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[1] As stated by the Board in *Roadway Express*, 108 NLRB 874, 875 (1954): ''[C]redibility findings may rest entirely upon evidence through observation which words do not, and could not, either preserve or describe.''

In respect to demeanor, the Supreme Court has said in *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962):

> For the demeanor of a witness . . . may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

[2] The Respondent argues that this incident was isolated and that thus the allegation should be dismissed. Although the incident occurred on only one occasion, the remark was of such a character that it would deter an employee from joining the Union and was such a remark that would normally be related to other employees. Besides the remark became the subject of a written grievance with its attendant publicity. Because the deterrant effect of the remark had a potential effect for the hearer and other employees who must have learned of the remark, it cannot be considered isolated.

On October 22, 1993, Prueter informed Desy that he intended to file a grievance. On October 26, 1993, Prueter met with Desy. Desy referred to the collective-bargaining agreement. According to Prueter while he was looking at the agreement, Desy said,

> I warn[ed] you about getting bad advice. I said, advice about what? He said, writing a grievance, it will lead to a bad situation. If the person you are talking with is not trustworthy and is a trouble-maker and [it] can lead for a bad situation for you. . . . I just want to warn you to be careful who you are getting advice from. . . . Mr. Desy . . . said . . . I could write a grievance if I so chose to, that was . . . my rights, but it was up to him to handle any grievance or explanation and he needed my written explanation, and either way it was not the [U]nion to solve this, the [U]nion had no part of the Prudential. This was a Prudential matter and was up to him to solve and he required me, again, to have the written information,[3] have it submitted to him.

Prueter further testified, ''[t]hat it didn't matter what happened during the grievance procedure, even if I filed it would be up to him to solve it and I could file if I wanted to. I am not quite sure if he said the word ineffectual [referring to the grievance].'' Construing the above testimony most favorable for the General Counsel I find that the General Counsel has not established a prima facie case. The allegations are dismissed.[4]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised.

2. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, the Prudential Insurance Company of America, Howell, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully advising employees that if they want to succeed or get into management they should not join the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at the premises of the Prudential Insurance Company of America at 7 and Owell, Michigan, and River Vail Office Building, Waterford, Michigan, copies of the attached notice marked ''Appendix.''[6] Copies of the notice on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act other than those found in this decision.

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[3] Desy pointed out the provision of the union contract (art. 20, sec. 2) that requires a sales representative to submit a written report and to undergo an interview without the Union's presence. Desy had asked for the written report. The meeting between Prueter and Desy was within the contract's terms. Prueter had asked for a union representative to be present. This was denied. Thus, the General Counsel issued *Weingarten* allegations in the complaint. They were dismissed before trial. See *Prudential Insurance Co.*, 275 NLRB 208 (1985). The contract provided a waiver.

[4] I credit the testimony of Prueter.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''